

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
VIDEO MEMORIES ASSOCIATES, LTD., AND MICHAEL MARANO, AS OFFICER	:	DETERMINATION DTA NO. 812291
	:	
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1985 through August 31, 1990.	:	

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Petitioners, Video Memories Associates, Ltd., and Michael Marano, as officer, 412 Pearl Street, Syracuse, New York 13203, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through August 31, 1990.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on August 31, 1994 at 1:30 P.M., with all briefs to be filed by January 15, 1995. Briefs were filed within the time prescribed. The due date for this determination is, therefore, measured from January 15, 1995. Petitioners appeared pro se.<sup>1</sup> The

Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUE

Whether the Division of Taxation improperly determined upon audit that petitioners' receipts from videotaping special events and providing copies of such videotapes to their clients

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<sup>1</sup>Joseph Rotondo intended to represent petitioners at the hearing in this matter. Mr. Rotondo stated that he was a "public accountant", but he was not enrolled with the New York State Education Department under Article 149 of the Education Law. No other alternative qualifications having been proffered, Mr. Rotondo was not eligible under the rules of the Tax Appeals Tribunal to represent these petitioners at hearing (20 NYCRR 3000.2[a][2][iii]).

are subject to sales tax.

### FINDINGS OF FACT

Video Memories Associates Ltd. ("Memories") and Michael Marano (together "petitioners") during all relevant periods were engaged in the business of photographing weddings and other special events on videotape for their customers in New York. The videotapes are then transferred to the customers and petitioners are paid a fee.

The Division of Taxation ("Division") audited petitioners' business operation for the period June 1, 1985 through August 31, 1990 ("the audit period") and concluded they were engaged in selling tangible personal property subject to sales tax under Tax Law § 1105(a).

The auditor made a written request for records requesting petitioners' books and records for the period June 1, 1987 through May 31, 1990. Petitioners provided sales invoices and sales journals for the years 1987, 1988 and 1989. At this point, the auditor determined that Memories was not a registered vendor and did not maintain a sales tax accrual account.<sup>2</sup> The auditor then advised petitioners that the audit was

being extended to include June 1, 1985 through May 31, 1987, and was being extended from May 31, 1990 to August 31, 1990. A verbal request for additional books and records for the extended period was made to petitioners (tr., pp. 28-30). The auditor conducted a detailed audit for the years 1987 through 1989 based on the records provided. No books and records were provided for 1985, 1986 and 1990 including Federal income tax returns.

Since no records were provided for 1985, 1986 and 1990, the auditor applied the annual inflation rate based on the cost of living index to 1987's actual gross sales to arrive at estimated gross sales for 1986. Similar computations were done for 1985. At the time of audit, the inflation rate for 1990 was not yet available, so the auditor took the average increases in sales from 1987 through 1989 and applied that average to 1989 sales to arrive at estimated gross sales

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<sup>2</sup>Petitioners registered immediately upon being advised by the auditor that their videotapes were taxable.

for 1990. The auditor's calculations took into consideration petitioners' exempt sales. The auditor arrived at total additional taxable sales of \$171,585.08 for the audit period with additional sales tax due of \$12,010.95. The audit methodology and audit computations are not disputed in this proceeding, and for that reason, have not been shown.

On July 12, 1991, notices of determination were issued to Memories asserting total additional sales tax due of \$12,010.95 for the audit period, plus penalty and interest. Corresponding notices were issued the same day to Mr. Marano, as officer.

Petitioners filed a timely request for conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). At the conciliation conference, petitioners provided the Federal income tax returns for 1985, 1986 and 1990. The auditor used the actual sales figures from these returns to recompute the tax for these years. Ultimately, the tax asserted upon audit was based on petitioners' own books and records.

On July 31, 1992, a Conciliation Order (CMS No. 118439) was issued to petitioners cancelling omnibus penalties and reducing the tax asserted for the audit period to \$11,029.26, plus penalty and interest, but otherwise sustaining the notices (Notice Nos. S910712148C, S910712149C, S910712152C, S910712153C).

Petitioners filed a timely petition with the Division of Tax Appeals challenging these assessments and the instant proceeding ensued. Memories paid tax on all of its purchases of videotapes. The auditor did not give the corporation credit for the tax paid on its purchases, since Memories was not a registered vendor. Since it was not registered as a vendor, Memories would not be able purchase with a resale certificate (tr., p. 38).

Petitioners called their public accountant, Joseph Rotondo, as a witness. Mr. Rotondo testified that he had advised petitioners that they were engaged in providing a service, not the taxable sale of tangible personal property. In forming his opinion, Mr. Rotondo stated that he did not look at section 526(8)(a)(3) of the Division's regulations.

Michael Marano testified that he graduated from Syracuse University with a degree in television and video. In 1983, he decided he wanted to videotape weddings. He went to his

lawyer, Mr. Primo, and Video Memories was incorporated. Mr. Primo advised him that his taping of weddings was a nontaxable service.

Mr. Marano started collecting sales tax from his customers back in 1990 when he was first advised by the auditor that his transactions were taxable. He stated that he was not trying to avoid paying sales tax, he was just relying on the advice of his accountant and attorney.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue that they are providing a nontaxable service.

The Division argues that petitioners' service of filming special events and transferring the videotapes to their customers is taxable.

#### CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on "[t]he receipts from every sale of tangible personal property . . . ." Tax Law § 1101(b)(3) defines the term "receipts" as "[t]he amount of the sale price of any property . . . taxable under this article . . . ." The sales tax regulations at 20 NYCRR 526.5 elaborate on what is included in the sales price of any property, thereby constituting a receipt subject to sales tax. In relevant part, this regulation provides as follows:

"(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

"Example 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses.

The customer is billed as follows:

Photographs (2)	\$100
Model fees	60
Meals	10
Travel	25
Props (Flowers)	<u>5</u>
Total due	\$200

Receipt subject to tax is \$200

"Example 2: An appliance repairman charges \$10 per hour plus expenses when on a service call. The customer is billed as follows:

3 hrs. at \$10	\$ 30
Travel	15
Parts	20
Meals	<u>5</u>

Total due  
Receipt subject to tax is \$70"

\$ 70

B. Tax Law § 1101(b)(5) defines sale, in part, as "[a]ny transfer of title or possession or both . . . in any manner or by any means whatsoever for a consideration." This language "is very broad and inclusive and clearly expresses an intent to encompass most transactions involving the transfer or use of commodities in the business world" (Matter of Coyne Industrial Laundry Inc. of Syracuse, State Tax Commission, August 31, 1977, citing Albany Calcium Light Co. v. State Tax Commission, 55 AD2d 502, 391 NYS2d 201, revd on other grounds 44 NY2d 986, 408 NYS2d 333).

"Consideration" includes:

"monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. 'Monetary consideration' includes assumption of liabilities, fees, rentals royalties or any other charge that a purchaser, lessee or licensee is required to pay" (20 NYCRR 526.7[b]).

Tax Law § 1132(c) states that:

"[I]t shall be presumed that all receipts for property or services of any type mentioned in subdivision (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer."

C. "Tangible personal property" means "corporeal personal property of any nature having a material existence and perceptibility to the human senses . . . " (20 NYCRR 526.8[a]). Tangible personal property includes, but is not limited to, "artistic items, such as sketches, paintings, photographs, motion picture films and recordings" (20 NYCRR 526.8[a][3]).

D. Petitioner Marano urges that he is not selling the videotape, but rather a service, which includes his expertise in filming special events.

It is undoubtedly true that part of what petitioners sell is their expertise and the service of taping events. However, it is the videotape memorializing the special event that the customer is seeking. Petitioners' expertise is just one of the elements that goes into making the video. While the videotaping of an event by itself would not be taxable, when petitioners go to an event, videotape the event, and transfer the videotape to the customer for a fee, petitioners are

making a retail sale of tangible personal property pursuant to Tax Law § 1105(a), and the entire receipt is subject to sales tax (Dynamic Telephone Answering v. State Tax Commission, 135 AD2d 978, 522 NYS2d 386, lv denied 71 NY2d 801, 527 NYS2d 767).

E. Tax Law § 1145(a)(1) imposes a penalty upon taxpayers who fail to timely file a return or timely pay any tax under Articles 28 and 29. Under Tax Law § 1145(a)(1)(iii) penalty may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect . . . ." In this case, petitioners demonstrated that they obtained tax advice from Mr. Rotondo, the public accountant, and Mr. Primo, their attorney. In both cases, petitioners were advised that the service they were providing was not taxable. These facts, along with the fact that petitioners began to collect and pay over sales tax as soon as they were advised to do so by the auditor, shows that their failure to pay sales tax was due to reasonable cause and not due to willful neglect. Penalties are cancelled.

F. The petition of Video Memories Associates, Ltd., and Michael Marano, as officer, is granted to the extent set forth in Conclusion of Law "E" and is otherwise denied, and the four notices of determination dated July 12, 1991, as modified by the Conciliation Order, are sustained together with applicable interest.

DATED: Troy, New York  
July 13, 1995

/s/ Carroll R. Jenkins  
ADMINISTRATIVE LAW JUDGE